JAN DE NUL (MALAYSIA) SDN BHD & ANOR v. VINCENT TAN CHEE YIOUN & ANOR

FEDERAL COURT, PUTRAJAYA
RAMLY ALI FCJ
AZAHAR MOHAMED FCJ
ROHANA YUSUF FCJ
MOHD ZAWAWI SALLEH FCJ
ABANG ISKANDAR JCA
[CIVIL APPEAL NO: 02(f)-7-02-2018(W)]
31 OCTOBER 2018

ARBITRATION: *Award – Setting aside – Whether award made in excess of jurisdiction – Whether there was breach of rules of natural justice – Whether award contrary to public policy – Whether test for intervention under s. 37 of Arbitration Act 2005 accepted and applied to facts and circumstances – Whether fit and proper case for judicial intervention to set aside award – Arbitration Act 2005, s. 37(1)(a)(v), (b)(ii) & (2)(b)(ii)*

Central Malaysian Properties Sdn Bhd ('CMP') was the developer of a project for reclamation of land comprising a plot of land ('the project'). By a letter of award, CMP awarded the project to Jan De Nul (Malaysia) Sdn Bhd ('JDN') for its construction. Jan De Nul Group ('Sofidra') was the guarantor guaranteeing the due performance by JDN of its obligations. However, works could not start as planned due to CMP's delay in meeting its initial financial and payment security obligation. Works only started after Vincent Tan, a substantial shareholder of CMP, executed a guarantee agreement in his personal capacity, guaranteeing the due performance by CMP of its obligations under the contract. Unfortunately, something disastrous happened at the site where much of the reclaimed platform gave way, resulting in the loss of one life ('RFI disaster'). Subsequently, CMP was in default of payment and JDN issued a notice notifying CMP that it had defaulted in its payment progress, which CMP failed to remedy. Thus, JDN terminated the contract. Sofidra and JDN proceeded to refer the dispute to arbitration. Vincent Tan and CMP also filed their counterclaim against JDN in the arbitral proceedings. After hearing the parties, the arbitral tribunal ('tribunal') delivered an award ('the award') and held, *inter alia*, that (i) JDN had validly terminated the contract; (ii) JDN was responsible for the RFI disaster; and (iii) JDN and Sofidra were ordered jointly and severally to pay CMP the sum of RM2,789,383.57 in respect of CMP's counterclaim. Sofidra and JDN filed originating summons under s. 37 of the Arbitration Act 2005 ('AA 2005') to set aside part of the award which had allowed CMP's counterclaim. The High Court, in upholding the decision of the tribunal and dismissing JDN's and Sofidra's application, found that JDA and Sofidra failed to prove their case under s. 37(1)(a)(v), 37(1)(b)(ii) and/or 37(2)(b)(ii)

of the AA 2005. Subsequently, the Court of Appeal dismissed Sofidra and JDN's appeal against the High Court decision and ruled that it was not a fit and proper case for judicial intervention to set aside the award under s. 37 of the AA 2005. Dissatisfied, Sofidra and JDN appealed to this court. Leave to appeal to the Federal Court was granted to JDN and Sofidra on the following question, namely whether as a matter of law the Court of Appeal was correct in ruling that the test for the intervention of the court under s. 37 of the AA 2005 as 'one where the award suffer from patent injustice and/or where the award is manifestly unlawful and unconscionable' bearing in mind that (i) the same could not be found in the language of s. 37 of the AA 2005; (ii) the same was not derived from any jurisprudence of the Model Law; and (iii) the same had been rejected by the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang & Other Appeals* ('*Far East Holdings*') as the test for intervention under s. 42 of the AA 2005. The main thrust of the present appeal was two fold (i) that the award was made in excess of jurisdiction in that it contained decisions on matters not submitted to them for arbitration or beyond the scope of submissions to arbitration under s. 37(1)(a)(v) of the AA 2005; and (ii) that the tribunal did not or had failed to provide an opportunity to be heard for the parties to submit on the basis upon which the tribunal had decided the case, thereby breaching the rules of natural justice, which was an instance that the award may be contrary to the public policy of Malaysia.

Held (dismissing appeal)
Per Ramly Ali FCJ delivering the judgment of the court:

(1) The pleaded case of CMP was clearly related to a dispute of whether JDN had breached its contractual obligations in causing the RFI disaster. The contract was before the tribunal; and therefore the tribunal was entitled, and in fact was incumbent, to take cognisance of the contract as a whole and accordingly to determine the parties' respective obligations under it. The tribunal had determined the legal implication of the contract on JDN's responsibilities, with particular reference to cl. 7.2(a) of the conditions of the contract. This court failed to see how the tribunal could be said to have strayed from the pleaded case and had gone beyond the submission of the parties to the arbitration. Hence, JDN's contention on the issue of excess of jurisdiction under s. 37(1)(a)(v) of the AA 2005 was baseless. (paras 41 & 42)

(2) The tribunal had made a detailed analysis of the parties' obligations from the perspective of risk allocation based on the evidence made available before it before coming to the conclusion that JDN had breached its obligations to execute the works with due care and skill as required under the contract. That finding by the tribunal was neither contrary to nor was it inconsistent with the evidence adduced at the hearing. The tribunal was certainly entitled to come to its considered

conclusion after hearing the parties that JDN had breached its obligations under the contract after detailed examination of the relevant clauses in the contract where the parties had apportioned the risks involved in the scope of the works. The complaint, as alleged by JDN, had failed to meet the requirements to prove that the tribunal had conducted the proceedings and issued the award in breach of the rules of natural justice. The JDN and Sofidra failed to establish their case that the award made was in conflict with the public policy of Malaysia under ss. 37(1)(b)(ii) and (2)(b)(ii) of the AA 2005. (paras 44, 45 & 70)

(3) In the recent decision in the case of *Far East Holdings*, which CMP claimed had rejected the tests of 'patent injustice' and 'manifestly unlawful and unconscionable', was only applicable to an application under s. 42 of the AA 2005 and hence was not applicable to the present appeal which was based on s. 37 of the AA 2005. The Court of Appeal had not dismissed JDN's and Sofidra's appeal on the ground that they had failed in the test of 'patent injustice' and/or 'manifestly unlawful and unconscionable'. Instead, the appeal was dismissed by the Court of Appeal on the ground that the court did not think it was a fit and proper case for judicial intervention to set aside the award. The Court of Appeal had not made any affirmative ruling to apply the test for intervention of the court under s. 37 of the AA 2005. (paras 66-68)

Bahasa Malaysia *Headnotes*

Central Malaysian Properties Sdn Bhd ('CMP') adalah pemaju sebuah projek penebusgunaan sebidang tanah ('projek'). Melalui satu surat tawaran, CMP mengawardkan projek kepada Jan De Nul (Malaysia) Sdn Bhd ('JDN') untuk pembinaannya. Jan De Nul Group ('Sofidra') adalah penjamin yang menjamin JDN untuk melaksanakan obligasi-obligasinya. Walau bagaimanapun, kerja-kerja tidak boleh dimulakan mengikut jadual kerana CMP lewat dalam memenuhi kewajipan kewangan dan pembayaran sekuriti awalnya. Kerja-kerja hanya bermula selepas Vincent Tan, pemegang saham utama CMP, melaksanakan perjanjian jaminan dalam kapasiti peribadi beliau, menjamin CMP akan memenuhi obligasinya bawah kontrak. Malangnya, satu kecelakaan berlaku di kawasan kerja itu di mana sebahagian besar platform yang ditebus guna telah runtuh, mengakibatkan satu kematian ('bencana RFI'). Seterusnya, CMP gagal membuat bayaran dan JDN mengeluarkan notis memberitahu CMP bahawa CMP gagal membuat pembayaran, yang gagal diremedi oleh CMP. Oleh itu, JDN membatalkan kontrak. Sofidra dan JDN merujuk pertikaian kepada timbang tara. Vincent Tan dan CMP memfailkan tuntutan balas terhadap JDN dalam prosiding timbang tara. Selepas mendengar pihak-pihak terlibat, tribunal timbang tara ('tribunal') mengeluarkan award ('award') dan memutuskan, antara lain, (i) JDN telah dengan sahnya membatalkan kontrak; (ii) JDN

bertanggungjawab untuk bencana RFI; dan (iii) JDN dan Sofidra diperintahkan secara bersesama dan berasingan membayar CMP jumlah RM2,789,383.57 berhubungan tuntutan balas CMP. Sofidra dan JDN memfailkan saman pemula bawah s. 37 Akta Timbang Tara 2005 ('ATT 2005') untuk mengetepikan sebahagian daripada award yang telah membenarkan tuntutan balas CMP. Mahkamah Tinggi, dalam mempertahankan keputusan tribunal dan menolak permohonan JDN dan Sofidra, mendapati JDA dan Sofidra gagal membuktikan kes bawah s. 37(1)(a)(v), (b)(ii) and/or (2)(b)(ii) ATT 2005. Seterusnya, Mahkamah Rayuan menolak rayuan Sofidra dan JDN terhadap keputusan Mahkamah Tinggi dan memutuskan bahawa ini adalah satu kes yang tidak sesuai untuk mahkamah campur tangan bagi pengetepian award bawah s. 37 ATT 2005. Tidak berpuas hati, Sofidra dan JDN merayu ke mahkamah ini. Kebenaran merayu ke Mahkamah Persekutuan diberi kepada JDN dan Sofidra atas soalan berikut, iaitu sama ada sebagai perkara undang-undang Mahkamah Rayuan betul dalam memutuskan ujian untuk campur tangan mahkamah bawah s. 37 ATT 2005 'apabila award mengalami ketidakadilan paten dan/atau jika award nyata menyalahi undang-undang dan tidak berpatutan' mengambil kira bahawa (i) yang sama tidak boleh didapati dalam bahasa s. 37 ATT 2005; (ii) yang sama tidak timbul daripada mana-mana jurisprudens Model Undang-undang; dan (iii) yang sama telah ditolak oleh Mahkamah Persekutuan dalam *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & Other Appeals* ('*Far East Holdings*') sebagai ujian campur tangan bawah s. 42 ATT 2005. Isu-isu utama dalam rayuan ini adalah (i) bahawa award dibuat melampaui bidang kuasa kerana mengandungi keputusan berkenaan perkara-perkara yang tidak dihujahkan untuk timbang tara atau melebihi skop hujahan timbang tara bawah s. 37(1)(a)(v) ATT 2005; dan (ii) bahawa tribunal tidak atau gagal memberi peluang untuk pihak-pihak berhujah atas dasar tribunal telah memberi keputusan, dengan itu melanggar peraturan keadilan asasi, yang mana satu contohnya adalah award bertentangan dengan polisi awam Malaysia.

Diputuskan (menolak rayuan)
Oleh Ramly Ali HMP menyampaikan penghakiman mahkamah:

(1) Kes yang diplidkan oleh CMP jelas berhubungan pertikaian sama ada JDN melanggar obligasi kontraktualnya dalam menyebabkan bencana RFI. Kontrak dikemukakan di hadapan tribunal; dan dengan itu tribunal berhak, dan berkewajipan, mengambil tahu berkenaan kontrak secara keseluruhannya dan untuk menentukan obligasi-obligasi pihak-pihak. Tribunal telah menentukan implikasi undang-undang kontrak berkenaan tanggungjawab JDN, dengan rujukan khusus pada kl. 7.2(a) syarat-syarat kontrak. Mahkamah ini gagal melihat bagaimana tribunal boleh dikatakan terpesong dari kes yang diplidkan dan telah melebihi hujahan pihak-pihak timbang tara. Oleh itu, hujahan JDN berkenaan isu melampaui bidang kuasa bawah s. 37(1)(a)(v) ATT 2005 tidak berasas.

(2) Tribunal telah membuat analisis terperinci obligasi-obligasi pihak-pihak dari perspektif peruntukan risiko berdasarkan keterangan yang dikemukakan sebelum mencapai kesimpulan bahawa JDN telah melanggar obligasinya untuk melaksanakan kerja-kerja dengan berhati-hati dan kemahiran yang wajar seperti yang diperlukan bawah kontrak. Dapatan yang dibuat oleh tribunal tidak bertentangan atau bukan tidak konsisten dengan keterangan yang dikemukakan semasa perbicaraan. Tribunal berhak mencapai kesimpulannya selepas mendengar pihak-pihak bahawa JDN telah melanggar obligasinya bawah kontrak selepas pemeriksaan terperinci klausa-klausa relevan dalam kontrak di mana pihak-pihak telah membahagikan risiko yang terlibat dalam skop kerja-kerja. Aduan, seperti yang didakwa JDN, gagal memenuhi keperluan-keperluan membuktikan tribunal menjalankan prosiding dan mengeluarkan award yang melanggar peraturan-peraturan keadilan asasi. JDN dan Sofidra gagal membuktikan kes mereka bahawa award bertentangan dengan dasar awam Malaysia bawah s. 37(1)(b)(ii) and (2)(b)(ii) ATT 2005.

(3) Dalam keputusan kes *Far East Holdings*, yang CMP dakwa telah menolak ujian 'ketidakadilan paten' dan 'nyata menyalahi undang-undang dan tidak berpatutan', hanya diguna pakai kepada permohonan bawah s. 42 ATT 2005. Mahkamah Rayuan tidak menolak rayuan JDN dan Sofidra atas alasan mereka gagal dalam ujian 'ketidakadilan paten' dan 'nyata menyalahi undang-undang'. Sebaliknya, rayuan tersebut telah ditolak oleh Mahkamah Rayuan atas alasan ini adalah kes yang tidak sesuai untuk campur tangan kehakiman bagi mengetepikan award. Mahkamah Rayuan tidak membuat keputusan afirmatif mengguna pakai ujian campur tangan bawah s. 37 ATT 2005.

Case(s) referred to:

AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal [2013] 2 CLJ 395 CA ***(refd)***

Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***

Kyburu Investment Ltd v. Beca Corporate Holdings Ltd [2015] 3 NZLR 644 ***(refd)***

Lesotho Highlands Development Authority v. Impregilo SpA & Others [2005] UKHL 43 ***(refd)***

Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd [2016] 3 CLJ 403 CA ***(refd)***

PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA [2007] 1 SLR 597 ***(refd)***

Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd [2018] 8 CLJ 291 CA ***(refd)***

Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd [2007] 3 SLR 86 ***(refd)***

Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 4, 8, 9, 37(1)(a)(v), (b)(ii), (2)(b)(ii), 39, 42

For the appellants - Rajendra Navaratnam, Raja Kumar, Raja Kandan & Mak Hon Pan; M/s Azman, Davidson & Co
For the respondents - Kamraj Nayagam, Kent Chai & Dawn Wong; M/s Mah-Kamariyah & Philip Koh

[Editor's note: For the Court of Appeal judgment, please see Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor And Other Appeals [2017] 1 LNS 1580 (affirmed); For the High Court judgment, please see [2016] 1 LNS 1234 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali FCJ:

Introduction

[1] The present appeal (Civil Appeal No. 02(f)-7-02-2018(W) by the appellants, Jan De Nul (Malaysia) Sdn Bhd (JDN) and Jan De Nul Group (Sofidra S.A) (Sofidra) is against the decision of the Court of Appeal dated 24 October 2017 dismissing their appeal relating to their application to set aside an arbitral award pursuant to s. 37 of the Arbitration Act 2005 (AA 2005).

[2] There is another related appeal ie, Civil Appeal No. 2(f)-8-02-2018(W) where the appellants are Tan Sri Dato' Sri Vincent Tan Chee Yioun (Vincent Tan) and Central Malaysian Properties Sdn Bhd (CMP).

[3] Both the appeals were heard together, but we will prepare separate judgment for each of them. The present judgment is only in respect of Civil Appeal No. 02(f)-7-02-2018(W) in relation to the setting-aside application under s. 37 of the AA 2005 by JDN and Sofidra.

The Parties

[4] JDN, at all material time, was a private company limited by share, incorporated in Malaysia; and Sofidra, was the ultimate holding company of JDN, incorporated in Luxembourg.

[5] CMP, at all material time, was a private company limited by share, incorporated in Malaysia; and Vincent Tan, was a substantial shareholder having a controlling stake in CMP.

Background Facts

[6] CMP was the developer of a project for reclamation of land comprising of a plot of land measuring 38.11 hectares, along about a 2km stretch of existing shoreline bordering Jalan Abu Bakar and Jalan Skudai in Johor Bahru (the project).

[7] CMP by a letter of award, awarded the project to JDN for its construction. Sofidra was the guarantor guaranteeing the due performance by JDN of its obligations. The relevant contract was executed by the parties on 23 March 2010. It was based on the Construction Industry Development Board (CIDB) Standard Form of Contract for Building Works - 2000 Edition.

[8] Works could not start as planned due to CMP's delay in meeting its initial financial and payment security obligation. Works only started on 8 October 2010 after Vincent Tan executed a guarantee agreement in his personal capacity, guaranteeing the due and functual performance by CMP of its obligations under the contract.

[9] By the end of October 2010, CMP was again in default of payment under the contract for progress claim certificates No. 5 and No. 6.

[10] Unfortunately, something disastrous happened at the site on 12 November 2010 where much of the reclaimed platform gave way and moved southwards resulting among other, in the loss of one life (the RFI disaster).

[11] On 16 November 2010, JDN issued a notice notifying CMP that it had defaulted in its payment progress. CMP failed to remedy the default. On 2 December 2010 JDN terminated the contract.

[12] On 12 August 2011 JDN and Sofidra proceeded to refer the dispute to arbitration. An arbitral tribunal was constituted on 31 January 2012 (the tribunal) and the parties proceeded with the arbitral proceedings. CMP and Vincent Tan filed their counterclaim against JDN in the arbitral proceedings.

[13] On 3 September 2015, after hearing the parties, the tribunal delivered an award (the award), and held, *inter alia*, that:

(i) JDN validly terminated the contract;

(ii) JDN was responsible for the RFI disaster;

(iii) JDN and Sofidra were ordered jointly and severally to pay CMP the sum of RM2,789,383.57 in respect of CMP's counterclaim with 5% interest from the date of the award until the date of payment; and

(iv) each party shall bear equally all the fees and expenses by the KLRCA and the arbitral tribunal.

At The High Court

[14] On 15 October 2015, Vincent Tan and CMP filed an originating summons to refer questions of law arising out of the award under s. 42 of the AA 2005. JDN and Sofidra also filed an originating summons to refer questions of law under the same section.

[15] On 23 December 2015, JDN and Sofidra filed another originating summons under s. 37 of the same Act to set aside part of the award which allowed CMP's counterclaim on the following grounds:

(i) that the award was made in excess of jurisdiction in that it contains decision on matters beyond the scope of the submission to arbitration under s. 37(1)(a)(v) of the AA 2005; and/or

(ii) that the award was in breach of public policy and/or natural justice under s. 37(1)(b)(ii) and s. 37(2)(b)(ii) of the AA 2005.

[16] JDN's main complaint was that the contract was a conventional contract with no design obligation resting upon JDN; and it was never the pleaded case or contention of the parties nor was any evidence led on the premise that was decided by the tribunal ie, staged construction was a design issue, and yet JDN was found to be responsible for the design of the project.

[17] After hearing the parties, the High Court upheld the decision of the tribunal and dismissed JDN's and Sofidra's application under s. 37 of the AA 2005 with costs of RM30,000.

[18] The High Court ruled that the tribunal had not acted in excess of jurisdiction and there was no breach of public policy and/or the rule of natural justice in making the award. The High Court found that JDN and Sofidra had failed to prove their case under s. 37(1)(a)(v), (b)(ii) and/or (2)(b) of the AA 2005.

[19] The High Court further ruled that JDN's contention that the tribunal had gone beyond its jurisdiction is baseless, as every opportunity had been given to JDN to present its case in the proceedings. The High Court was of the view that JDN was seeking to take issue with the merit of the tribunal's decision which in effect seeking to appeal against the award to the court, and this was not permitted in a challenge proceedings under s. 37 of the AA 2005.

[20] On the issue of public policy, the learned High Court Judge had expressed his view that in order for JDN to succeed in a complaint of a breach of public policy, JDN must show that the "most basic notions of morality and justice would be offended" by the award and the breach is something "clearly injurious to the public good in Malaysia".

[21] In his conclusion, the learned High Court Judge ruled as follows:

> I am in total agreement with CMP that the complaint leveled by JDN on the public policy ground of a breach of natural justice, even if taken at its highest, does not meet the requirements to prove that the tribunal had issued an award in breach of public policy. JDN have not sufficiently particularised a complaint for breach of natural justice recognisable under the AA 2005.

At The Court Of Appeal

[22] Dissatisfied with the dismissal of their application, JDN and Sofidra filed an appeal to the Court of Appeal.

[23] On 24 October 2017, the Court of Appeal dismissed the appeal with costs of RM20,000 and ruled that it was not a fit and proper case for judicial intervention to set aside the award under s. 37 of the AA 2005.

[24] The Court of Appeal unanimously affirmed the decision of the High Court. The Court of Appeal expressed its view, *inter alia*, that "s. 37 ground relates to arbitral process. The threshold to satisfy the grounds to be low. However, the court is given discretion not to set aside the award notwithstanding the applicant can establish one or more of the grounds set out in s. 37. In considering whether or not to set aside the award, the court is obliged to look at other provisions of the Act and take a holistic approach as far as practical to sustain the award."

[25] The Court of Appeal elaborated:

> The court's role is to ensure substantive integrity of the arbitral process is maintained at all stages. Trivial complaints framed as excess of jurisdiction related to the manner the arbitral tribunal had handled the issues which arose from the substantive contract having the arbitration clause should not be much of a concern for the court in the regime of party autonomy concept. Only violent breaches on the face of record which compromise the integrity of the decision making process should be the cause of concern for the courts.

[26] The Court of Appeal further expressed its view that "it is now well settled that in Malaysia, the arbitrator's award is final, binding and conclusive and can only be challenged in exceptional circumstances."

At The Federal Court

[27] Leave to appeal to the Federal Court was granted to JDN and Sofidra on the following question, namely:

> Whether as a matter of law the Court of Appeal is correct in ruling that the test for the intervention of the court under s. 37 Arbitration Act 2005 as "one where the award suffer from patent injustice and/or where the award is manifestly unlawful and unconscionable", bearing in mind that:
>
> (i) the same cannot be found in the language of s. 37 Arbitration Act 2005;
>
> (ii) the same are not derived from any jurisprudence of the Model Law; and
>
> (iii) the same have been rejected by the Federal Court in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & 2 Other Appeals* [Federal Court Civil Appeal No. 02-19-047-2015 & other appeals] as the test for intervention under s. 42 Arbitration Act 2005.

Submissions By Counsel For JDN And Sofidra

[28] Learned counsel for JDN and Sofidra submitted that the test of "patent injustice" or "manifestly unlawful or unconscionable" as applied by the High Court and the Court of Appeal was the wrong test for intervention under

s. 37 of the AA 2005 as the same cannot be found in the language of the section itself. By applying the said test, the Court of Appeal had imposed an additional requirement and had set an unreasonably high threshold before the court can intervene in the arbitral award.

[29] Learned counsel argued that the proper test to be applied for intervention by the court under s. 37 of the AA 2005 should be derived from the language or wordings of the section itself listing out the possible grounds for intervention and guided perhaps by the jurisprudence in relation to art. 34 of the Model Law which s. 37 of the AA 2005 is based upon.

[30] Learned counsel further submitted that once the grounds are established, it is then for the court to decide whether or not to exercise its discretion to set aside the arbitral award based on the circumstances of the case. There is no requirement that the award must suffer from "patent injustice" or is "manifestly unlawful and unconscionable" before the court may intervene. Thus, it was submitted that the question posed ought to be answered that the Court of Appeal was wrong in determining that the test for intervention of the court under s. 37 of the AA 2005 is one where the award suffers from "patent injustice" or where the award is "manifestly unlawful and unconscionable"; and therefore, based on the proper test to be adopted in respect of s. 37 of the AA 2005, the award delivered by the tribunal ought to be set aside.

Submissions By Counsel For CMP And Vincent Tan

[31] Learned counsel for Vincent Tan and CMP, on the other hand, submitted that an arbitration award is final and can only be challenged in exceptional circumstances as the AA 2005 and the UNCITRAL Model Law require recognition of party's autonomy and minimal intervention by the court; and the court does not exercise an appellate jurisdiction over arbitration awards.

[32] Learned counsel also submitted that s. 37 of the AA 2005, which has its equivalent in art. 34 of the UNCITRAL Model Law on International Commercial Arbitration and Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, uses the word "may" as opposed to the word "shall"; and thus, it is evident that the court is vested with discretion to intervene and the discretion must be exercised judiciously guided by the best practices under the UNCITRAL Model Law regime and must also be subject to any other specific requirements of the AA 2005 itself.

[33] Learned counsel further submitted that JDN's and Sofidra's contention that the tribunal had acted in excess of jurisdiction is clearly devoid of merit as neither JDN nor Sofidra were deprived of their rights to submit on the issues of design and conventional contracts; and there was also no breach of the rules of natural justice throughout the arbitration proceedings.

[34] On the issue of public policy, learned counsel pointed out that JDN and Sofidra had failed to specify in what way the award was in breach of the rules of natural justice that was deemed to be contrary to the public policy of Malaysia. JDN and Sofidra had also failed to identify any procedural illegality that resulted in a substantial miscarriage of justice to them.

Our Decision

[35] The main thrust of the present appeal by JDN and Sofidra is two-fold:

(i) that the award was made in excess of jurisdiction in that it contains decisions on matters not submitted to them for arbitration or beyond the scope of the submissions to arbitration under s. 37(1)(a)(v) of the AA 2005, (excess of jurisdiction issue); and

(ii) that the tribunal did not or had failed to provide an opportunity to be heard for the parties to submit on the basis upon which the tribunal had decided the case, thereby breaching the rules of natural justice which is an instance that the award may be contrary to the public policy of Malaysia (natural justice/public policy issue).

[36] With regard to the excess of jurisdiction issue, JDN and Sofidra contended that the basis upon which the arbitral tribunal had decided the case was never "in play" and was based on its "own idea". This constituted a "new difference" between the parties and the award consequently ought to be set aside. They claimed that the arbitrator had gone on a frolic of its own and decided the case based on an argued question of law, question of construction of the contract and question of fact without first according an opportunity for the parties to submit on the issue. It was submitted that the tribunal's decision that JDN was responsible for the reclamation-failure-incident (the RFI disaster), notwithstanding that the tribunal had found as a fact that the staged construction was a design method, has disregarded the parties' pleaded case, contentions and the manner in which the case was represented as well as the evidence led during the arbitral proceedings.

[37] The pleaded case of JDN and Sofidra was that the contract between JDN and CMP was a conventional contract where JDN builds to CMP's design; the need for ground improvement, *via* staged construction, is an issue of design and needed to be specified and communicated; where JDN was not responsible for such design by reason of cl. 7.2(a) of the contract.

[38] CMP's and Vincent Tan's pleaded case was that the ground improvement, *via* staged construction, constituted a method of construction which was left to be determined by JDN and the reclamation-failure-incident (the RFI disaster) was caused by JDN purportedly not following the method statement/work programmed as stipulated in the contract.

[39] JDN and Sofidra contended that the parties' pleaded case in the arbitration proceedings was merely that of a contest between "design" and "method of construction". JDN and Sofidra claimed that the basis of the

decision of the tribunal that although staged construction was a "design" issue, JDN nevertheless bore the responsibility to carry out the same was never put forth by the parties; and that finding constituted a "new difference" between the parties.

[40] The High Court held that JDN's complaint did not meet the high standard of the tribunal having made a determination on a "new difference" that was outside the scope of the submission to arbitration; thus the complaint did not amount to a "new difference".

[41] The learned judge was of the view that CMP's pleaded case clearly relates to a dispute of whether JDN had breached its contractual obligations in causing the reclamation-failure-incident (the RFI disaster). The learned judge agreed with CMP that the contract was before the tribunal; and therefore the tribunal was entitled, and in fact was incumbent, to take cognizance of the contract as a whole and accordingly to determine the parties' respective obligations under it. The learned judge further said:

> Howsoever the isolated issue of whether "staged construction is a design issue" is answered, it does not detract the tribunal from having to determine the overarching issue of whether JDN had breached its Contractual obligations in causing the RFI. With that this court agrees.

[42] We agree with the learned judge that the tribunal had determined the legal implication of the contract on JDN's responsibilities, with particular reference to cl. 7.2(a) of the conditions of contract. We also agree with the learned judge in his conclusion on the issue that "I fail to see, in the light of the above how the tribunal could be said to have strayed from the pleaded case and had gone beyond the submission of the parties to the arbitration." We would also come to the same conclusion (as made by the High Court and affirmed by the Court of Appeal) that JDN's contention on this issue of excess of jurisdiction under s. 37(1)(a)(v) of the AA 2005 was baseless.

[43] On the issue of a breach of the rules of natural justice, JDN and Sofidra alleged that the tribunal had decided the case on a basis not raised or contemplated by the parties in the arbitration ie, that JDN was responsible under the contract to carry out staged construction and/or ground treatment even though it was found to be a design issue; and therefore the tribunal had summarily dismissed, without notice, the contentions of the parties' pleaded case and/or the evidence led in the arbitration hearings as unhelpful; and that the tribunal, without notice, denied them an opportunity to be heard and/or a fair opportunity to present their case on the issue upon which the arbitration was decided.

[44] After reading the records and documents relating to the arbitral proceedings before the tribunal, we share the same view with the learned High Court Judge that in the present case the tribunal had made a detailed analysis of the parties' obligations from the perspective of risk allocation based on the evidence made available before it before coming to the conclusion that JDN had breached its obligations to execute the works with

due care and skill as required under the contract. That finding by the tribunal was neither contrary to nor did inconsistent with the evidence adduce at the hearing.

[45] In the present case, we are satisfied that the parties had sufficiently raised all the relevant issues in their respective pleadings. The tribunal was certainly entitled to come to its considered conclusion after hearing the parties that JDN had breached its obligations under the contract after detailed examination of the relevant clauses in the contract where the parties have apportioned the risks involved in the scope of the works.

[46] The learned High Court Judge had given clear explanation to support his finding that the complaint as alleged by JDN has failed to meet the requirements to prove that the tribunal had conducted the proceedings and issued the award in breach of the rules of natural justice. The learned judge had correctly ruled that JDN had not sufficiently particularised the complaint recognisable under the AA 2005. At para. [166] of the judgment, the learned judge explained as follows:

> It must be noted that in the present case the tribunal had given every opportunity to both CMP and JDN to present evidence and make representations on all issues that arose for determination. The parties had filed a total of nine (9) expert reports with voluminous exhibits attached. The parties also proceeded to two (2) joint expert reports; one on the issue of quantum and the other on the geotechnical issues regarding the RFI. As pointed out by Mr Malik Imtiaz, the parties had submitted a total of twelve (12) written submissions in 895 pages. JDN had applied for permission to put in further submissions beyond the directions of the tribunal and the tribunal allowed the application and directed parties to file in their respective further submissions. On top of that, after the close of the evidentiary hearing, JDN made an application to the tribunal to adduce new documents. Though CMP objected, the tribunal allowed JDN to adduce further evidence after the close of the evidentiary hearing.

[47] The issue of a breach of public policy of Malaysia was also raised by the parties in the proceedings before the High Court Judge. JDN and Sofidra complained that the award delivered by the tribunal was in conflict with the public policy of Malaysia and/or the rules of natural justice under s. 37(1)(b)(ii) and s. 37(2)(b)(ii) of the AA 2005.

[48] Under s. 37(1)(b)(ii) of the AA 2005, an award may be set aside by the High Court, if the High Court finds that the award is in conflict with the public policy of Malaysia. Under s. 37(2)(b)(ii) an award is said to be in conflict with the public policy of Malaysia where a breach of the rules of natural justice occurred in connection with the making of the award.

[49] The term "public policy" is not defined in the AA 2005. However, the term appears in three different sections, namely of ss. 4, 37 and 39 of the AA 2005. As commonly used, the term "public policy" signifies some matter which concerns public good and public interest. It is a fundamental principle of justice in substantive and procedural aspects.

[50] The High Court Judge expressed his view that in order for JDN to succeed in its complaint that the award was in conflict with the public policy of Malaysia, JDN must show that the most basic notions of morality and justice would be offended by the award and that the conflict is something clearly injurious to the public good in Malaysia.

[51] "*A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*" by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) had highlighted the term 'public policy' as follows: "In discussing the term 'public policy, it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice. It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects."

[52] The term "public policy" as appears in s. 37(1)(b)(ii) of the AA 2005 covers a scope of "public policy" elements as used generally. However, in s. 37(2)(b)(ii) the scope is more specific. It specifically categorises a breach of the rules of natural justice which occurred in connection with the making of an award as being in conflict with the public policy of Malaysia.

[53] The decision of the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR 597, provides a good guidance on the interpretation of the term "public policy" in an application to set aside an arbitral award made by a tribunal, on the ground of a breach of the rule of natural justice for being in conflict with the public policy. In that case Chan Sek Keong CJ (delivering the judgment of the court) ruled:

> Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' (see *Downer Connect* (58) at (136), or is 'clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public' (see *Deutsche Schachbau v. Shell International Petroleum Co Ltd* [1987] 2 Lloyds Rep 246 at 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co Inc v. Societe Generalede L'Industrie du Papier* (RAKTA) 508 F 2d 969 (second Cir, 1974) at 974.

[54] In a recent case of *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd* [2018] 8 CLJ 291; [2018] 3 MLRA 219, the Court of Appeal held *inter alia*, that a breach of the rules of natural justice that occurred in an arbitral proceedings which has a real and substantial impact on the outcome of the arbitration and the eventual award rendered, is plainly said to be in conflict with the public policy of Malaysia.

[55] Section 37(2)(b)(ii) of the AA 2005 provides that an award made by an arbitral tribunal would be in conflict with the public policy of Malaysia if a breach of the rules of natural justice occurred in connection with the making of the award. The circumstances stated in s. 37(2) are by no means exhaustive. Other appropriate circumstances may also fall under the category of "public policy" in view of the opening phrase "without limiting the generality of sub- para (1)(b)(ii)" as appears in s. 37(2) of the AA 2005. However, it must be appreciated that the concept of public policy generally is itself a broad concept. But in applying the concept for the purpose of setting aside an award under s. 37 of the AA 2005, the concept of public policy ought to be read narrowly and more restrictively. The court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia. As clearly stated by the Court of Appeal in *Sigur Ros* (with which we agree): "The concept of public policy must be one taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused."

[56] Even though the court finds that a breach of the rules of natural justice has been established or that an arbitral award is in conflict with the public policy under s. 37 of the AA 2005, it does not necessarily mean that the award must be set aside as a matter of course. The power of the court to set aside an award under s. 37 is discretionary and will not be exercised automatically in every case where the complaints are established. (see: *Kyburu Investment Ltd v. Beca Corporate Holdings Ltd* [2015] 3 NZLR 644; *Sigur Ros Sdn Bhd (supra).*

[57] The court must evaluate the nature and impact of the particular breach in deciding whether the award should be set aside under s. 37. The court must also consider the background policy of encouraging arbitral finality and minimalist intervention approach to be adopted in line with the spirit of UNCITRAL Model Law. The effect of ss. 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international practice. (see: *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395; *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83; and *Lesotho Highland Development Authority v. Imprigelo SpA & Others* [2005] UKHL 43). In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined.

[58] The scope of public policy ground for setting aside an arbitral award could only be invoked in deserving case ie, in instances where it appears a violation of the most basic notions of morality and justice. It covers fundamental principles of law and justice in substantive as well as procedural respect. Instances where the upholding of an arbitral award would shock the conscience, or clearly injurious to the public good, or wholly offensive to the ordinary reasonable and fully informed member of the public, had been held by courts in various jurisdiction to fall within the category of public policy ground for setting aside an arbitral award. Thus, instances such as "patent injustice", "manifestly unlawful and unconscionable", "substantial injustice", "serious irregularity" and other similar serious flaws in the arbitral process and award, would also fall within the applicable concept of public policy and therefore by virtue of s. 37(1)(b)(ii) of the AA 2005 when proven, can be a ground for the court to exercise its discretion to set aside the award. (see: *Ajwa for Food Industries (supra)*). Such instances fall within "the basic and fundamental notions or principles of justice". The court must adopt the principle as laid down by Howard M. Holtzmann and Joseph E Neuhans as found in their commentary in "*A guide to the UNCITRAL Model on International Commercial Arbitration: Legislative History and Commentary*" (*supra)* "that the term "public policy" which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects." The terms "patent injustice" or "substantial injustice" or "manifestly unlawful and unconscionable" as often used by the court in setting aside arbitral awards, do not mean injustice which is more than *de minimis*; what is required is that the injustice had real effect and had prejudiced the basic right of the applicant. (see: *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86).

[59] In relation to the question posed before us, JDN's and Sofidra's main complaint was that the Court of Appeal had erred in ruling that the test for intervention under s. 37 of the AA 2005 as "one where the award suffers from patent injustice and/or where the award is manifestly unlawful and unconscionable" as the said test has no basis in law and had set an unreasonably high threshold before the court could exercise its discretion for intervention.

[60] Before we deal with question posed, it is necessary to first establish whether the Court of Appeal had in fact, made such a ruling in its judgment in dismissing JDN's and Sofidra's appeal. We have to peruse the judgment of the Court of Appeal first. If it is established as a matter of fact, that such ruling was actually made by the Court of Appeal in its judgment, then we will accordingly deal with and answer the question posed. If the Court of Appeal in fact had not made such ruling, then the question posed would be highly hypothetical and we will not be able to give an appropriate answer as to whether the Court of Appeal erred or not; or our answer given would be purely academic and does not help in the determination of the appeal before us.

[61] JDN and Sofidra contended that the Court of Appeal, at para. 8 of its judgment had set out that the test for both s. 37 and s. 42 of the AA 2005 as one "where the award suffer from patent injustice and/or where the award is manifestly unlawful and unconscionable."

[62] CMP and Vincent Tan on the other hand, argued that the Court of Appeal did not set out the test for intervention under s. 37 of the AA 2005 as alleged. The said test for intervention as cited by the Court of Appeal in its judgment refers to a decision in another case, namely, *Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd* [2016] 3 CLJ 403, relating to a reference on questions of law under s. 42 of the AA 2005. It is not for an application to set aside an award under s. 37 of the AA 2005.

[63] In order to appreciate the issue, it is helpful to have sight of para. 8 of the Court of Appeal's judgment:

> [8] Appreciating the distinction in our sections 37 and 42 AA 2005 in relation to EAA 1996, the Court of Appeal in *Petronas Penapisan* (*supra*), had in simple terms advocated that the test for intervention will be related to one where the award suffer from patent injustice and/or where the award is manifestly unlawful and unconscionable. Parading English judgments in submissions or cases relating to sections 37 or 42 in actual fact have no jurisprudential utility. The test in England can be said to be one related to low threshold to intervene and in Malaysia the legislation has placed a high threshold for intervention. Though the threshold to satisfy the ground state in section 37 may be low ...

[64] We have read the whole judgment of the Court of Appeal. We found that the only part of the judgment where the words "patent injustice" and "manifestly unlawful and unconscionable" were mentioned, was in para. 8 thereof. From the plain reading of that paragraph we cannot find any clear finding or determination by the Court of Appeal that the said test was accepted and applied to the facts and circumstances of the present case. The Court of Appeal cited the passage from another case of *Petronas Penapisan (supra)* in appreciating the distinction between our ss. 37 and 42 of the AA 2005 in relation of the English Arbitration Act 1996 (EAA 1996). The said passage was in relation to the provision of s. 42 and not s. 37 of the AA 2005. Both these sections relate to different purposes and different tests for consideration. They are not the same. The consideration by the court in dealing with the applications under the sections varies. The cited test applicable in establishing an application under s. 42 may not be the same with and not applicable to an application under s. 37 of the Act.

[65] In drawing a clear distinction between ss. 37 and 42 of the AA 2005, the Court of Appeal in *Petronas Penapisan (supra)*, made the following observation (with which we agree):

> An application to set aside an award under s. 37 largely deals with issues relating to the award making process and has nothing to do with error of facts and/or law on the face of record unless the exception applies;

such as public policy. An application under s. 42 has nothing to do with the award making process but has everything to do with the award *per se* and error of law on the face of record which error substantially affects the rights of one or more of the parties. The distinction between ss. 37 and 42 is that like of an apple and an orange.

[66] For that matter, even the recent decision of this court in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693 (Federal Court Civil Appeal No. 02-19-04-2016) which CMP claimed had rejected the tests of "patent injustice" and "manifestly unlawful and unconscionable", to our understanding, was only applicable to an application under s. 42 of the AA 2005 (which was the subject matter of that case) and hence, was not applicable to the present appeal which is based on s. 37 of the Act.

[67] In the present case, there was nothing to show that the Court of Appeal had dismissed JDN's and Sofidra's appeal on the ground that they have failed in the test of 'patent injustice' and/or 'manifestly unlawful and unconscionable'. Instead, the appeal was dismissed by the Court of Appeal on the ground that after reading the appeal records and submissions of learned counsels, the court did not think it was a fit and proper case for judicial intervention to set aside the award.

[68] On the above reasoning, we are more inclined to hold that the Court of Appeal had not made any affirmative ruling to apply the test for intervention of the court under s. 37 of the AA 2005 as stated in the leave question posed before us. We are therefore not in the position to give an answer to the question posed.

Conclusion

[69] For the reasons elaborated above it is our view that the learned High Court Judge had made a correct finding that the tribunal had not strayed from the pleaded case of the parties in their submissions to the arbitration and had not gone beyond the submissions of the parties. Therefore JDN's and Sofidra's contentions on this issue under s. 37(1)(a)(v) of the AA 2005 to support their appeal was correctly dismissed. The Court of Appeal had correctly affirmed the decision.

[70] The learned High Court Judge had also correctly found, (and correctly affirmed by the Court of Appeal) that on the facts and circumstances of the case, that JDN and Sofidra had failed to establish their case on a breach of natural justice and that the award made by the arbitral award was in conflict with the public policy of Malaysia under s. 37(1)(b)(ii) and 37(2)(b)(ii) of the AA 2005. Therefore their appeal on this issue must also fall.

[71] In the upshot, we dismiss the appeal (Civil Appeal No. 02(f)-7-02-2018(W) with costs. We affirm the decision of the courts below.